IN THE

Supreme Court of the United States

October Term, 1969
No 305

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN HEFFRON SISSON, JR.

On Appeal From the United States District Court for the District of Massachusetts.

Brief of the Los Angeles Selective Service Law Panel, Amicus Curiae.

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Interest of Amicus.*

The Los Angeles Selective Service Law Panel is a panel of over 100 attorneys in the Los Angeles community specializing in or practicing selective service law and litigation. The Panel was established in 1967 to render free assistance to individuals in need of counsel in selective service matters. Members of the panel aided over 5000 men during 1969, both in their capacities as Panel members and as attorneys retained by registrants. Panel members have personally litigated over

*Written consents by attorneys for both parties have been filed with the Clerk.

250 selective service cases and have been instrumental in re-shaping selective service law in the Court of Appeals for the Ninth Circuit.

Amicus has a particular interest in the development and application of constitutional law with regard to the Military Selective Service Act of 1967.

Introductory Statement.

This is not the first time that Section 6(j) of the Military Selective Service Act (50 U.S.C. App. § 456 (j) (1969)), or its precursors, has been before this Court for consideration. In *United States v. Seeger,* 380 U.S. 163 (1965) this section was interpreted "in the candid service of avoiding a serious constitutional doubt." Douglas, *J*, concurring, 380 U.S. at 188. Once again questions of constitutional magnitude surround the controversy of the interpretation and application of the statutory exemption from military service of those conscientiously opposed to participation in war.

This brief of amicus will deal, however, with one narrow question: Has Congress, by enacting Section 6(j) of the Military Selective Service Act of 1967, which allows exemption from service only to those who hold conscientious opposition to participation in war in any form by reason of religious training and belief, contravened the First Amendment's prohibition against the establishment of religion. More specifically has Congress "pass[ed] laws which aid one religion, aid all religions, or prefer one religion over another."? *Eversen v. Board of Educ.,* 330 U.S. 1, 15 (1947).

Summary of Argument.

Amicus argues that the inherent conflict between the First Amendment's "free exercise" and "establishment" clauses (see *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 296 (1963) (concurring opinion of Brennan, *J.*)) requires an expansion of conscientious objector status to those who are conscientiously opposed to war other than by reason of religious training and belief. Otherwise so to hold creates advantages for those with religious training or religious belief as the basis for their conscientious opposition to participate in war, and also encourages participation in religions training and acceptance of religious dogma as the core for an individual's opposition to participation in war. Further, *amicus* argues that since Congress allows conscientious objector classification status to those opposed for religious reasons to all war, the exemption must constitutionally extend to those who are selective religious conscientious objectors and that the establishment clause will again require that the corresponding non-religious believer be granted the same classification as the religious believer in order not to violate the Constitution's command of "governmental neutrality between religion and non-religion." *Epperson v. Arkansas*, 393 U.S. 97, 103-4 (1968).

ARGUMENT.

THE CONSTITUTION REQUIRES THAT CONSCIENTIOUS OBJECTOR CLASSIFICATIONS BE GIVEN TO NON-RELIGIOUS SELECTIVE CONSCIENTIOUS OBJECTORS IN ORDER TO AVOID AN "ESTABLISHMENT" OF RELIGION.

Introduction.

Congress has granted to religious conscientious objectors exemption from military service in section 6(j) of the Military Selective Service Act of 1967. Whether this legislation was motivated by a belief by Congress that such an exemption was constitutionally required[1] or not is not meet for this brief to discuss.[2] Congress has granted such exemption and, unless it is unconstitutional in and of itself, the grant of exemption to religious conscientious objectors has created its own realities because this Court has interpreted the "establishment" clause of the First Amendment to require that "[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster or promote one religion or religious theory against another or even against the militant opposite. The First

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[1]Despite the case law, which seems to adopt a "legislative grace" theory, in light of the current interpretations of the First Amendment, this is an open question: *See* MacGill, *Selective Conscientious Objection: Divine Will and Legislative Grace,* 54 Va. L. Rev. 1355, 1386-93 (1968).

[2]If the conscientious objection exemption is constitutionally required, grave constitutional questions over the current administration of the Selective Service System are tendered and may require extensive modifications of that system. *See, e.g.,* White, *Processing Conscientious Objector's Claims: A Constitutional Inquiry,* 56 Calif. L. Rev. 549 (1968) for an extensive analysis.

Amendment mandates governmental neutrality between religion and religion and between religion and non-religion." *Epperson v. Arkansas,* 393 U.S. 97, 103-4 (1968). Even if it is believed that the "free exercise" clause of the First Amendment *requires* a statute of the temper of Section 6(j) of the Military Selective Service Act of 1967, this still does not create the situation which Mr. Justice Brennan fears might occur as expressed by his concurring opinion in *School Dist. of Abington Twp. v. Schempp,* 374 U.S. 203, 296-99 (1963), which is that when "free exercise" is at stake, the "establishment" clause of the First Amendment is muted by the greater interest. In the *Schempp* case, Justice Brennan states that there "are certain practices, conceivably violative of the Establishment Clause, which might seriously interfere with certain religious liberties also protected by the First Amendment." He cites as examples the provision of chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion and the granting of draft exemptions for ministers and conscientious objectors. But a distinction is vital. The "free exercise" interest mutes the "establishment" interest *only when there are no other alternatives.* For example, chaplains are provided for prisoners and soldiers by the Government because there is only one other alternative available. Allowing chaplains to soldiers and prisoners *vel non* is an all or nothing proposition. Allowing exemptions to ministers so that they may preside over their congregations, *vel non,* is also an all or nothing proposition. Allowing conscientious objector exemptions because impelled by the First Amendment "free exercise" clause would not derogate the "establishment" clause and render it mute. The al-

ternative of denying all conscientious objector exemptions and consequently "free exercise" is not the only one available to the legislature, or if need be, to the judiciary. A less onerous alternative is also available: a provision allowing non-religious conscientious objectors to obtain conscientious objector exemptions. By extending the conscientious objector exemption to secular as well as religious conviction, the free exercise of religion could be protected and the separation of church and state maintained. Thus, whether the "free exercise" clause does or does not impel section 6(j) of the Military Selective Service Act of 1967, the results are the same and the "establishment" clause need not be muted. Therefore, this Court may adopt this position uniquely applicable to resolution in this instance, and avoid confrontation between the "free exercise" and "establishment" clauses of the First Amendment.

See also, Conklin, *Conscientious Objector Provisions: A View in Light of Torcaso v. Watkins*, 51 Geo. L. J. 252 (1963).

A. Section 6(j) by Its Terms Provides Exemption for "Religious" "Non-Selective" Conscientious Objectors.

Section 6(j) of the Act provides, in relevant part, that:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

The language of the Act and judicial gloss applied since this section of the Act was first interpreted in *United States v. Kauten,* 133 F. 2d 703 (2d Cir. 1943), in effect categorize four classes of conscientious objectors: (1) religious, non-selective conscientious objectors;[3] (2) religious, selective conscientious objectors;[4] (3) non-religious, non-selective conscientious objectors;[5] and (4) non-religious, selective conscientious objectors.[6]

The most recent explication of Section 6(j) by this Court dealt generally with the rights of religious, non-selective conscientious objectors, in *United States v. Seeger,* 380 U.S. 163 (1965). Despite disclaimers by the Court at *id.* at 173, this Court's broad definition of "religion" and "Supreme Being" may be read to encompass two distinct views. First, the definition may indeed vitiate any distinction between a "religious man" opposed to participation in war and a conscientiously moral atheist opposed to participation in war. See, *e.g., Conscientious Objectors: The Aftermath of United States v. Seeger,* 30 Albany L. Rev. 304, 311 (1966):

> The Court implies that an atheist would not be able to meet the "parallel to God" test. Much of

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[3]*See, e.g., United States v. Kauten,* 133 F. 2d 703 (2d Cir. 1943) denying a conscientious objector classification.

[4]*See United States v. Bowen,* (N.D. Cal., Dec. 24, 1969, Crim. No. 42499). The opinion of the court in *Bowen,* in the form of "Memorandum on Granting Motion for Judgment of Acquittal" is reprinted in full in the Appendix to this Brief.

[5]*See United States v. Schacter,* 1 S.S.L.R. 3272 (D. Md. 1968) and *Welsh v. United States,* No. 76, this Term.

[6]The issue presented in this case.

the difficulty comes from the various connotations given the term atheism. Dictionaries define it as merely a disbelief in or denial of God. Clearly this does not present a different problem because the court explains that Buddhists and others whose religions are not founded on a diety are not automatically disqualified under the statute. At the other extreme, if the term atheist means only those persons who resolutely deny the existence of God, and in addition profess to believe in nothing whatsoever, such persons would be unable to prove that they sincerely and conscientiously object to participation in war in any form because of an obligation to an authority higher to the state. Perhaps the court has in mind a man who holds some system of beliefs but disclaims any religious basis for them, no matter how broadly the term religion is interpreted.

Other commentators feel that the *Seeger* definition may mean that ". . . . when any given set of beliefs assumes sufficient importance in any individual's life to impose upon him the duty of refraining from participation in any war at any time, he can fairly be said to be religious as that term is used in the statute." *Conscience, The Constitution, and The Supreme Court: The Riddle of United States v. Seeger,* 1966 Wisc. L. Rev. 306 (1966). *See also* Rabin, *When Is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise,* 51 Cornell L.Q. 231, 242-43 (1966).

B. The Due Process and Equal Protection Clauses of the Constitution Require That an Exemption Be Granted to a Religious Selective Conscientious Objector.

Religious selective conscientious objectors present one of the two issues present in the instant case: selectivity. It should be pointed out that in the context of the American experience, the selective conscientious objector does not "pick" his war, but rather his beliefs determine whether he can participate in the particular war for which he is being inducted and expected to support in a military capacity. Instead, the selective conscientious objector manifests his beliefs, by refusing to submit to induction and by going to prison (see *United States v. Spiro,* 384 F. 2d 159 (3d Cir.) *cert. denied* 390 U.S. 956 (1968)), indicating his position that he can not fight in the particular war for which he is being drafted. Today that war is the military action in Viet-Nam.[7]

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[7]This is important because most pacifistic dogmatists of the world's major religions have fallen into disrepute among their contemporaries because the spectre of nuclear war has become an "all-or-nothing" affair for mankind which paints pacifism today as an "all-or-nothing" affair for the individual believer. *See* Potter, *Conscientious Objection to Particular Wars,* 4 Religion & Pub. Order 44, 75-76. Viet-Nam, however, provides dramatic proof that this is not the situation today, yet we may be so conditioned by nuclear war as to refuse to think otherwise. *See* H. Kahn, *On Thermonuclear War* (1960); *Thinking About the Unthinkable* (1962). That a conscientious objector would use self defense is not grounds for denial of the conscientious objection exemption. *United States v. Gearey,* 379 F. 2d 915 (2d Cir.), *cert. denied,* 389 U.S. 959, *rehear. denied,* 389 U.S. 1010 (1967). This would seem to militate for a distinction between total and limited wars and between just and unjust wars. *Cf. Sicurella v. United States,* 348 U.S. 385 (1955). *United States v. Parimeter,* 173 F. Supp. 677 (S.D.N.Y. 1959). It should be noted that in 1918, Secretary of War Newton D. Baker ex-

(This footnote is continued on the next page)

The recent case of *United States v. Bowen* (D.C.-N.D. Cal., Dec. 24, 1969, Crim. No. 42499) (reprinted in full in Appendix), sets forth "due process" and "equal protection" rationales for including selective religious conscientious objectors among those to whom exemptions from service should extend. Bowen was a devout Catholic who believed that the Catholic Church distinguished between just and unjust wars and that his church prohibited him from participating in the Vietnamese conflict. Counsel adduced expert testimony that Bowen's belief of his church's doctrine was reasonable. This included a supporting letter from Rev. Terence O'Shaughnessy, O.P., Chairman, Theology Department, Aquinas College; testimony from Bernard De Primo, former Associate Professor of Philosophy at Aquinas College who had taught a course attended by Bowen on the Catholic teaching in respect to war; testimony by the Rev. James C. Straukamp, an ordained Catholic priest and member of the Society of Jesus; and stipulations by Bowen's counsel and the government that the Reverend Peter J. Riga, Professor of Theology at St. Mary's College, Moraga, California, and the Reverend William J. O'Donnell, Assistant Pastor, St. Joachim's Church, Hayward, California and Newman Club Chaplain at Chabot College were duly ordained priests in the Roman Catholic Church, qualified to testify to Catholic theology, doctrine and religious training and belief, and would testify to the same effect as Father Straukamp and Mr. De Primo.

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tended conscientious exemption from military service to selective (*and* non-religious) objections—at a time when the United States was fighting a total, but non-nuclear, war. L. Rothenberg, *You and the Draft* 188-89 (1968).

Father Straukamp in testifying, noted that the Catholic teaching of obedience to conscience did not lead to anarchy because in forming his conscience the Cahtolic is guided by the teaching of the church in matters of faith and morals. In forming conscience the Catholic is to give deference to the commands and laws of the state and its leaders, and may disobey the state only where the state commands acts which violate the commands of God. "Defendants Brief after Trial," *United States v. Bowen,* pp. 3-5. (See also footnote 1 of the court's opinion (page 2 slip opinion).) Bowen's sincerity that his religion must require him to abstain from participation in the Viet-Namese war was unquestioned, and he cited scripture and Catholic Doctrine and Propaganda in support of his belief. *Id.* at pp. 3-6. In the face of this evidence, Bowen's counsel, Richard Harrington, Esq. of San Francisco, California, argued in "Defendant's Brief after Trial":[8]

"It appears fair to take defendant's sincerity as established, and that the defendant is honest in his religious motivation, without saying that other members of defendant's religion not taking Bowen's stand are any less sincere.

"As the Supreme Court held in *United States v. Seeger,* 380 U.S. at 184-185 (1965):

> "Some theologians, and indeed some examiners, might be tempted to question the existence of registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government. * * * Local boards and courts in this sense are not free to reject beliefs because they consider

[8]Amicus hereby incorporates into its Argument that portion of the *Bowen* Brief printed herein.

them 'incomprehensible.' Their task is to decide whether the beliefs professed by a registrant are sincerely held, and whether they are in his own scheme of things, religious.

"For identical reasons, whether Bowen's beliefs are orthodox or shared by only some members of his religion is not of significance to constitutional protection of his religious belief:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *Board of Education v. Barnette,* 319 U.S. 625 at 641-42 (1943).

"Since Bowen's sincerity and the religious basis for his refusal of induction appear to be established, the remaining question is constitutional:

"Is the law constitutionally deficient in not allowing an individual to make his own choice and decision regarding the justice or injustice of a particular war, where the individual conscientiously believes that his religion prohibits participation in wars which his conscience finds unjust, but permits participation in other hypothetical wars which his conscience can conceive of as just?

"In deciding the foregoing constitutional questions, it is all-important to recall that Congress has exempted conscientious objectors of certain religions from military service. Section 6(j) of the Act. . . ."

. . .

"Thus, a sharp question of due process and equal protection of law arises when members of one religion—e.g. the Quakers—are exempted from criminal liability in refusing military service while members of another religion—Catholics—are held to be felons for conduct which is identical—refusing military service at the same time and place.

"It denies due process and equal protection of law to compel a Catholic conscientious objector to abandon one of the precepts of his religion as a condition to receiving the exemption from military service accorded to members of other religions.

"*Sherbert v. Verner,* 374 U.S. 398 at 402 and 404 (1963) holds:

> "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such. *Cantwell v. Connecticut,* 310 U.S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins,* 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island,* 345 U.S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania,* 319 U.S. 105; *Follett v. McCormick,* 321 U.S. 573; cf. *Grosjean v. American Press Co.,* 297 U.S. 233. Page 402.
>
> "Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following

> the precepts of her religion and forefeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. Page 404.

"It must be kept in sharp focus that in this case Bowen is not being charged with crime for his *conduct*—because section 6(j) provides and the government concedes that an orthodox, sincere Quaker or any total pacifist is entitled to refuse induction upon grounds of religious training and belief upon the same date and in the same place that Bowen refused induction.

"Thus, the charge against Bowen is not for his conduct, but rather for his belief—more precisely that Bowen subscribes to a religion the doctrine of which does not condemn all war as necessarily unjust, but admits that Bowen as a Catholic might participate in some other war which he in conscience concludes to be just, although he is in religion bound to refuse to participate in the particular war in which he is asked to serve because he finds such participation contrary to conscience.

"That the difference relates to theology or doctrine—and not to conduct—becomes particularly clear from historical observation. A Quaker or any other total pacifist is free to change his mind at any time and elect to participate in a particular war which he comes to regard as particularly just. Many pacifists of the 1930's

volunteered for military duty and served in the front ranks in World War II against Hitler.

"When a Catholic and a Quaker each refuse induction into military service here and now based upon religious conscientious objection, the only fact that can be ascertained is that the refusal of each is based upon present religious scruple. It is sheer speculation to guess what either objector might do in another war, at another time and place and under other conditions.

"To attach penalties to the Catholic for conduct here and now identical to that of the Quaker is to penalize the Catholic solely for his doctrine—because his religious doctrine in theory admits that the Catholic might act differently in other circumstances, though the Catholic under his religion like the Quaker under his religion is compelled to refuse induction into military service at the time and place actually in question.

"Thus, upon analysis, it becomes clear that it is only the individual who can in any case make the decision to adhere to a particular religion such as the Society of Friends or the Roman Catholic Church or any doctrine of either, and that to adhere to or abandon a particular doctrine is no less a choice solely of the individual than is the choice of the Catholic the choice of an individual guided by his religion to render or to refuse military service in a particular war.

"The Supreme Court pointed the way for the courts to stay free of theological controversy by adopting an objective test in *United States v. Seeger,* 380 U.S. 163 (1965):

> "We believe that under this construction, the test of belief 'in relation to a Supreme Being' is whether a given belief that is sincere and meaning-

ful in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in relation to a Supreme Being' and the other is not. 380 U.S. at 165-166.

"Continuing the Court points out:

"While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?

"Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight.

* * * * *

"The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government. * * * Local boards and courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious. 350 U.S. 163 at 184-185.

"Let us apply the *Seeger* objective test to Bowen: Bowen believed that the laws of God, taught by his religion compelled him to refuse induction into [the] military . . . in 1968. Objectively considered, Bowen's belief occupies 'the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption.' *United States v. Seeger,* 380 U.S, at 184.

"Applying the objective test, both the orthodox Quaker clearly qualified for exemption and the Catholic like Bowen subscribe to the proposition that 'in the forum of conscience, duty to a moral power higher than the State has always been maintained.' *United States v. Seeger,* 380 U.S. 163 at 170, quoting Chief Justice Hughes dissenting in *United States v. Macintosh,* 283 U.S. 605 at 633.

"By adopting the objective test in *Seeger,* the Supreme Court corrected the error made by the majority in *United States v. Macintosh, supra,* which had to be overruled in *Girouard v. United States,* 328 U.S. 61 (1945). The dissenters in *Macintosh* protested the denial of citizenship to Macintosh, a Baptist minister and professor of theology at Yale, because:

> "he was not willing 'to promise beforehand' to take up arms, 'without knowing, the cause for which my country may go to war' and that 'he would have to believe that the war was morally justified.' He declared that 'his first allegiance was to the will of god'; 283 U.S. at 629.
>
> "Chief Justice Hughes stated in his dissent:
> "He was not willing 'to promise beforehand' to take up arms, 'without knowing, the cause for

"The foregoing paraphrase of *Sherbert v. Verner,* 374 U.S. 398 at 404 is not exact only because Bowen's constitutional objection is much stronger: Mrs. Sherbert was denied unemployment insurance by South Carolina for conduct—refusing to work on Saturday, her religious day of worship. By contrast, Bowen here is to be punished for doctrine: The government concedes he would be exempt from military service if here and now he only would disaffirm so much of Catholic theology and doctrine as admits that a hypothetical war can be conceived in which Bowen in just conscience could participate. Because Bowen is unwilling to give up his belief in the Catholic just war doctrine, the government contends he should be jailed as a felon. Such punishment for doctrine the First, Fifth and Fourteenth Amendments prohibit so long as Bowen's conduct is objectively no different from that of Quakers and members of other traditional pacifist religions clearly exempted from military service by Section 6(j).

"Section 6(j) should be construed to exempt Bowen and other selective conscientious objectors in the candid service of avoiding serious constitutional doubt.

"The Second Circuit held the draft act unconstitutional in requiring belief in a Supreme Being in *United States v. Seeger,* 326 F. 2d 846 (2d Cir. 1964). The Supreme Court avoided the constitutional question by adopting an objective test of religious belief for application under the draft act. *United States v. Seeger,* 380 U.S. 163 (1965).

"The concurring opinion in *Seeger* noted the established rule of construction to construe an Act of Congress to save it from demise on constitutional grounds. In a more extreme case than the present one we said

that the words of a statute may be strained 'in the candid service of avoiding a serious constitutional doubt.' *United States v. Rumely,* 345 U.S. 41, 47. 380 U.S. at 188.

"The Court in *Rumely* referred to the foregoing rule of construction as a 'principle of wisdom and duty . . . .' 345 U.S. at 47.

"Turning to Section 6(j) of the Selective Service Act, it is at least worthy of note that the Supreme Court faced the question whether a conscientious objector must be opposed to all war. The court stated:

> "The test is not whether the registrant is opposed to all war, but whether he is opposed on religious grounds to *participation* in war." *Sicurella v. United States,* 348 U.S. 385 at 388 (1955) (emphasis in original).

"The government has sought to distinguish *Sicurella* upon the ground that it involved a Jehovah's Witness who would fight only in a theocratic war. This distinction fails completely in respect of a Catholic, for Catholic theology explicitly holds that the duty of obedience to public authority arises when exercised in conformity to divine law only as a form of obedience to God, on the principle that because some form of political community and public authority are required in the nature of things, and thus belong to the order of things divinely foreordained so long as authority is exercised within the limits of divine law. *Pastoral Constitution on the Church in the Modern World,* Section 74; *Pacem in Terris,* paragraphs 46-48.

"Thus, by Catholic theology the Catholic may participate in war upon command of public authority only

when the command of public authority is in conformity to God's law and thus may be recognized as an expression of God's command.

"Theologically, in short, the Catholic like the Jehovah's Witness may participate in war only upon God's command.

"Next, the government cites *United States v. Kauten*, 133 F. 2d 703 at 708 (2d Cir. 1943):

> "There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter and not the former, may be the basis of exemption under the Act.
>
> "The court continues:
>
> "The former is *usually* a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has been thought a religious impulse. 133 F. 2d at 708 [emphasis added].

"The government has not yet explained how dictum in the Second Circuit in 1943 can overcome the square holding of the Supreme Court in *Sicurella* twelve years later:

> "The test is not whether the registrant is opposed to all war, but whether he is opposed on religious grounds to *participation* in war. 348 U.S. 385 at 388 (1955).

"In point of fact the defendant in *Kauten* was opposed to all war, whereas the defendant in *Sicurella*

was not opposed to theoractic war or war in defense of his religious brethren. The holding of *Kauten* is that political, as opposed to religious, objection is not ground for exemption:

> "The Registrant makes it quite clear that his religious training and belief is not the basis of his present opposition to war.
>
> "There is no doubt that the Registrant is sincerely opposed to war but this belief emanates from personal philosophical conceptions arising out of his nature and temperament, and which is to some extent, political. 133 F. 2d at 707, footnote 2.

"To the extent *Kauten* was denied exemption because he was a fallen-away Catholic rather than orthodox religionist, *Seeger* (also involving a fallen-away Catholic) settled the law that an objective test is to be applied—to wit, the rule the belief plays in the individual's life—rather than a test for doctrinal orthodoxy or regularity in attendance in a particular church of a traditionally pacifist disposition.

"Indeed, the Ninth Circuit in 1954 rejected the error now urged by the government upon this court. In *Shepherd v. United States,* 217 F. 2d 942 (9th Cir. 1954) the registrant was granted exemption from limitary service despite his statement:

> "'I am not a pacifist because when God commands me to fight, I will. I will fight to defend my ministry and my brethren, to do the will of my father who is in heaven.' (Matt. 12:50). 217 F. 2d 942 at 944 fn. 2.

"The court followed *Hinkle v. United States,* 216 F. 2d 8 (9th Cir. 1954) holding that belief in self

defense or the righteousness of theocratic wars did not necessarily negative conscientious objection.

"*Taffs v. United States,* 208 F. 2d 329 at 331 (9th Cir. 1954) held:

> "Whether a certain war is theocratic or not is a matter of religious belief into which we are forbidden to delve. Appellant's positive and uncontradicted testimony was that he was conscientiously opposed to participation in war because he regarded his duties to Jehovah as being superior to any duties arising out of human relationships. This testimony not being impeached, the test of the statute was met.

"The defendant has standing to attack the construction and constitutionality of the Selective Service Act, because it was applied to deny him exemption accorded other religious conscientious objectors.

"The government's pre-trial memorandum . . . asserts that the mere belief by a registrant that the war in Vietnam is unjust 'does not constitute a sufficient ground upon which to refuse to submit to induction, nor is it a defense to a criminal prosecution for refusal to perform one's military obligation. *United States v. Rehfield,* .... F. 2d .... (9th Cir., September 15, 1969); *United States v. Mitchell,* 369 F. 2d 323 (2nd Cir. 1966), cert. den. 386 U.S. 972 (1967); [other citations omitted].'

"*Rehfield* cites and follows *Mitchell* for the proposition that the illegality of the war in Vietnam even if established affords no defense to refusal of induction, because the power to 'raise and support armies . . . is a matter quite distinct from the use which the

Executive makes of those who have been found qualified and who have been inducted into the Armed Forces.' *United States v. Mitchell,* 323 F. 2d at 324 quoted in *United States v. Rehfield,* (p. 4 of slip opinion).

"The foregoing cases are not in point to the claim of religious conscientious objection by Bowen. The Selective Service Act does not purport to exempt from military service men who think a particular war is illegal, but it does purport to exempt from military service under Section 6(j) men who are opposed by religious belief to participation in war.

"Bowen made it clear that his religious objection extended to military service within the United States as well as anywhere else, upon the obvious ground [to him] that military service in any place would constitute proximate participation in the war by assisting its prosecution or by freeing another soldier to take part therein. Moreover, it appears to be accepted that the courts cannot review the duty assignment of a soldier once he has submitted to induction. *Orloff v. Willoughby,* 345 U.S. 83 (1953); *Noyd v. McNamara,* 267 F. Supp. 701 (Colo.) aff's 378 F. 2d 538 (10th Cir.), cert. denied 389 U.S. 1022 (1967).

"Section 10(b)(3) of the Act expressly provides judicial review [in the criminal prosecution]:

> "No judicial review shall be made of the classification or processing of any registrant by local boards . . . except as a defense to a criminal prosecution instituted under Section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, . . . Provided, that such review shall go

> to the question of the jurisdiction herein reserved to local boards . . . only where there is no basis in fact for the classification assigned to such registrant.

[*See also Clark v. Gabriel,* 393 U.S. 256 (1968).]

"The Ninth Circuit has long granted review under *Dickinson v. United States,* 346 U.S. 389 (1953).

"*Shepherd v. United States,* 217 F. 2d 942 at 946 (9th Cir. 1954) declared:

> We think that a hearing before a Department proceeding upon an erroneous theory as to what constitutes opposition to 'participation in war in any form' is no better than no hearing at all.

"Thus, if the local board proceeded upon an erroneous theory as to what constitutes opposition to 'participation in war in any form', then this court should hold the denial of exemption to Bowen to be without basis in fact.

"For some reason the government brief neglects to cite *United States v. Spiro,* 384 F. 2d 159 (3rd Cir. 1967) cert. denied 390 U.S. 958 (1968) (Justice Black and Justice Douglas are of the opinion that certiorari should be granted).

"*Spiro* held:

> Appellant claims that the granting of conscientious objector status to Jehovah Witnesses who will fight only in a theocratic war and the denial of such status to a Catholic who will fight only in a 'just war' violates his federally protected right to religious freedom and to equal protection of the law. Both the Selective Service authorities and the

District Court found that appellant did not meet the statutory test for granting of conscientious objector status. See 50 U.S.C. App. §456(j) (1964). We have authority to reverse only if there has been a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact. *Estep v. United States,* 237 U.S. 114 (1946). . . .

After thoroughly reviewing the record we can only conclude that appellant's classification did have a factual basis. Once this conclusion is reached, we are without jurisdiction to delve into the legal and theological implications of appellant's beliefs. 384 F. 2d at 160-161.

"*Spiro* would be correct if a basis in fact appeared in the record for finding that Spiro was insincere or did not in fact object to serving in the armed forces at the time he was called to submit to induction.

"If *Spiro* is asserted for the proposition that the court is without power to upset application of an erroneous standard by the local board in denying conscientious objector status to a registrant, then *Spiro,* is inconsistent with *Sicurella v. United States,* 348 U.S. 385 (1955) as well as the Ninth Circuit decision in *Shepherd v. United States,* 217 F. 2d 942 (9th Cir. 1954). *Sicurella* and *Shepherd* reversed convictions for refusal of induction because the hearing officer or local board applied an erroneous standard in determining whether the registrant was opposed by reason of religious training and belief 'to participation in war in any form.'

"More basically, it is obvious that it denies due process to incarcerate an individual upon the theory that

an administrative board has a basis in fact for a finding under a test which was either erroneous or unconstitutional. *Cf. United States v. Seeger,* 380 U.S. 163 (1965); *Oestereich v. Selective Service System,* 393 U.S. 233 (1968).

"For the reasons stated Section 6(j) of the Military Selective Service Act of 1967 should be construed to exempt Catholic 'just war' objectors from military service if they are found sincere in their religious objection to participation in any form in the war in which they are called to serve.

"If Section 6(j) is construed to exclude Catholic just war objectors from exemption from military service in a war to which they do object by reason of religious training and belief, because Catholic doctrine admits that other hypothetical wars might later arise in which the Catholic objectors might justly participate, Section 6(j) should be declared unconstitutional as denying equal protection of the law and due process, as well as for establishing religious doctrine and infringing upon the free exercise of religion." "Brief for Defendant After Trial," at 7-20.

The district court in *Bowen* determined that it would have to make a constitutional examination of section 6(j) of the Act because the court was "foreclosed by precedent from . . . a construction of the statute" granting the exemption to selective religious objectors (citing *Kauten v. United States,* 133 F. 2d 703, 708 (2d Cir. 1943) and *Negre v. Larsen* (9th Cir. Nov. 10, 1969).) Slip opinion at p. 4. Citing *Sherbert v. Verner,* 374 U.S. 398 (1963), the court did, however, determine that such a constitutional examination did not require a decision that the "free exercise" clause of the First

Amendment mandated the necessity of the religious conscientious objector exemption. Slip opinion at p. 5 and n. 4. (*See also Speiser v. Randall*, 357 U.S. 513, 518 (1958); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960) and MacGill, *Selective Conscientious Objection: Divine Will & Legislative Grace*, 54 Va. L. Rev. 1355, 1377 n. 89 (1968).) The *Bowen* court then found that section 6(j) specifically discriminated among religious beliefs:

> The Government argues further, that because the statute makes no mention of specific religious sects and because it inquires into the subjective beliefs of the individual applicant rather than into the tenets of one's religion, there is no discrimination between religions. Here, again, the Government's contentions are devoid of merit. The constitutionality of a statute is measured more by the results of its application than by its phraseology. [Here the court notes: "If the statute in terms provided that Quakers should be exempt but Catholics should not, there could be no reasonable doubt of its constitutional invalidity. The infirmity is not less if that is the effect of the statute even if the phraseology is not that bald."] Responsible court inquiry must go beyond the words to the practical effects. *Terry v. Adams*, 345 U.S. 461 (1953). Constitutional infirmities may not be covered up or overcome by apparently innocuous statutory language. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) . . . *Epperson v. Arkansas*, 393 U.S. 97 (1968). . . .
>
> Nor is it permissible to discriminate invidiously by employing as statutory standards individual traits which effectively distinguish one group from an-

other. *Guinn v. United States,* 238 U.S. 347 (1915); *Hobson v. Hansen,* 269 F. Supp. 401 (D.D.C. 1967). . . .

An examination of the practical effects of § 6(j), based on judicial notice, the *amicus* briefs, and the extensive testimony in this case, leads necessarily to the conclusion that members of traditionally pacifist religions—such as Quakers and Jehovah's Witnesses—are generally exempted from military service while members of other religions—such as Bowen's Roman Catholic faith—are not so exempted. *United States v. Bowen, supra,* slip opinion at pp. 5 and 6.

In addition to this decision based upon the "establishment" clause the court believed that "Section 6(j) must also fall before the constitutional prohibition against denial of equal protection of the laws." Slip opinion at p. 7.

The court found that mere selectivity is an impermissible classification, violative of equal protection and due process.

Normally, courts require only that a statute employ a classification which is reasonable in the light of the purposes of the Act. In *Shapiro v. Thompson,* 394 U.S. 618 (1969), this test was held not to be controlling. There the court held unconstitutional a requirement that to be eligible for welfare, persons must have lived within the jurisdiction for one year. The Court noted that the residency requirement discouraged travel and concluded that where so fundamental a right as the right to travel is infringed, "any classification which serves to penal-

ize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." 394 U.S. at 634 (emphasis in original). *See also Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) (the court indicated that it would examine with "strict scrutiny" legislation which infringed on a right as important as that of procreation). In other cases it may be difficult to determine whether the right involved should be considered fundamental, but no rights are more fundamental than those of the First Amendment here involved. So, applying the *Shapiro v. Thompson* test, it is clear that there is no compelling governmental interest for distinguishing the defendant, who is opposed to participation in the Vietnam war on religious grounds, from others who are religiously opposed to all wars. Slip opinion at pp. 8-9.

While the Constitution may impel, by reason of the "free exercise" clause, exemption to both religious nonselective objectors and religious selective objectors, that issue need not be decided here. But to determine that the judgment below be affirmed, *amicus* argues that this Court should determine that *Bowen* is correctly decided; *viz.,* that Congress by exempting religious nonselective conscientious objectors must, in order not to establish privileges for certain religions or to discriminate among them, also allow a selective religious conscientious objector exemption; and that any contrary judicial interpretation of section 6(j) is incorrect.

This Court may make such a determination by an interpretation of the existing statutory language, which does not in itself *exclude* selectivity. The statute grants

exemption to those who are "conscientiously opposed to participation in war in any form." If the phrase "in any form", as limited by *Sicurella* to mean only, in the language of the decision, shooting wars between nations on earth, then the phrase "participation in war" may also be deemed limited to the particular war being waged rather than "all wars". See also the *Bowen* court's attempt to avoid the constitutional issue by statutory construction in slip opinion at pp. 3-4.

C. It Is an "Establishment" of Religion to Disallow the Section 6(j) Exemption to an "Atheist."[9]

The third category, that of non-religious, non-selective contientious objection, presents the case of the "atheist" (if that term is viable after *United States v. Seeger,* 380 U.S. 163 (1965)) who is non-selectively opposed to war. (That is, who meets the "opposition to all wars" element denominated in *United States v. Kauten,* 133 F. 2d 703, 708 (2d Cir. 1943).)

Here *amicus* argues that the "establishment" clause of the First Amendment requires that non-religious, non-selective objectors also be given the exemption granted to religious, non-selective objectors. *Amicus,* while agreeing with the result, finds the statutory interpretation in *United States v. Schacter,* 1 S.S.L.R. 3272 (D. Md. 1968), allowing exemption to an atheist who

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[9]This issue will be given plenary consideration in *Welsh v. United States,* No. 76, this Term, slated for argument with *Sisson.* Argument on this issue is included at this point to indicate the necessity of reaching the issue in this case.

had by reason of previous religious training and belief adopted his objection to war, unsound. This is because the constitutional issues the interpretation attempts to avoid are merely shifted into another context.[10]

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[10]In *United States v. Schacter*, the court determined that the phrase "by reason of religious training and belief" did not require that the objector *currently* hold the religious belief derived from prior religious training and belief to be eligible for the exemption. The court felt impelled, by reason of the *Seeger* rationale, to "save" the statute which it would otherwise have had to declare unconstitutional, presumably as an "establishment of religion." The special facts in *Schacter*, including the registrant's long and traditional training in the orthodoxy of his former faith (Judaism), therefore established "religious training and belief." In and of itself, this interpretation would still render section 6(j) of the Act unconstitutional for it compels the objector to espouse a religious belief and requires objectors who wish exemption to seek "religious training" prior to determining if they are conscientiously opposed to participation in war. This the Government may not do, either directly or indirectly. *See Everson v. Board of Educ.*, 330 U.S. 1 (1947); *School District of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Torcaso v. Watkins*, 367 U.S. 488 (1961); Conklin, *Conscientious Objector Provisions: A View in Light of Torcaso v. Watkins*, 51 Geo. L.J. 252 (1963).

The court also felt impelled to examine the inartful language of the section which attempted to define a "religious belief," and attempted to distinguish such beliefs from a "merely personal moral code" which the statute declares is not a religious belief. The court determined that any belief externally derived was not a "merely personal moral code." Yet *all* beliefs are externally derived. Every moral imperative is based upon normative presumptions which create values and allow individuals to deduce moral codes therefrom. (The "merely personal" language must thus mean "unique" and thus distinguishes among traditional, reasonable and unusual religions. This is impermissible, *Ballard v. United States*, 322 U.S. 78 (1944), and seems, in addition to "establishing" religion, to violate the equal protection and due process clauses of the Constitution.) As John Donne said in another context, "No man is an island unto himself." It has been a cornerstone of western psychology, unquestioned by even the most radical and "objective" philosophers such as Ayn Rand, that every man's beliefs are derivative from some greater collective normative impulse. *See, e.g.*, S. Freud, *Totem and Taboo* (1952, J. Starchey translation).

Section 6(j) of the Act must be found unconstitutional unless those references to "religious training and belief" are stricken so that the following remains:

> Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who . . . is conscientiously opposed to participation in war in any form . . . .

To hold otherwise leaves intact a statute which violates the "establishment" clause of the First Amendment.

While it is true that all courts which, prior to the *Bowen* case, have considered the constitutional question, have held the statute not to violate the "establishment" clause of the First Amendment, *amicus* argues that in light of this Court's most recent interpretations of that clause, the Constitution now requires an opposite result.

The only case in which this Court was confronted with the issue was *Arver v. United States,* 245 U.S. 366 (1918). In upholding the validity of the compulsory military service laws, this Court stated,

> And we pass without anything but the statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we are at the outset referred, because we think its unsoundness is too apparent to require us to do more. 245 U.S. at 389-90.

(At the time *Arver* was decided Congress exempted "from military service in the strict sense the members

of religious sects as enumerated whose tenets excluded the moral right to engage in war," although such persons were required to perform non-combatant services. 245 U.S. at 376.)

Various attacks on the statute since 1918 all have been as summarily dismissed. Language in *George v. United States*, 196 F. 2d 445, 450-452 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952), is often relied on:

> In sum, as the exemption from participation in war on the ground of religious training and belief can be granted or withheld by the Congress, the Congress is free to determine the persons whose opinions the Congress does not class as religion in the ordinary acceptance of the war. So, assuming that the definition of "religious training and belief" in Section [6(j)] *is* restrictive, such restriction is within the constitutional power of the Congress.

Relying on this statement, the Ninth Circuit has held the religious exemption constitutional in *Etcheverry v. United States*, 320 F. 2d 873, 874 (9th Cir.), *cert. denied* 375 U.S. 930 (1963), *rehear. denied* 375 U.S. 989, 376 U.S. 939 (1964), 380 U.S. 926 (1965) and *Clark v. United States*, 236 F. 2d 13, 23-24 (9th Cir.) *cert. denied* 352 U.S. 882, *rehear. denied* 352 U.S. 937 (1956). There is, however, an important difference in the present case. *Amicus* does not urge that the grant of exemption to only religious objectors be held unconstitutional because (without having to decide if a conflict exists between the "establishment" and "free exercise" clauses *inter se*) less onerous alternative is available: to allow exemption to non-religious objectors. Since 1947 a number of this Court's cases inter-

preting the "establishment" clause call for a reconsideration of the *Arver* decision.

> None of the Supreme Court decisions dealt with the constitutionality of the "religious training and belief" provision of section 6(j) of the Act now in question. But, to say the least, the rationale of these other decisions provides fodder for a strong argument that the "religious training and belief" provision of section 6(j) cannot withstand a constitutional challenge." Hamley, Circuit Judge, dissenting in *Welsh v. United States,* (9th Cir. September 23, 1968) at 15-16.

Judge Hamley argues that the Court should have considered the "establishment" clause violation question, and that by avoiding it "the result reached by the majority represents a negative answer to the constitutional question, but the majority has not said why." *Id.* at 22.

The first in the series of cases most recently explicating the parameters of the "establishment" clause was *Everson v. Board of Educ.,* 330 U.S. 1 (1947). (In the *Everson* case, a New Jersey statute authorized local boards of education to make rules and contracts for the transportation of children to and from schools other than private schools operated for profit. Pursuant to this statute, a local board authorized the reimbursement to parents for fares paid for the transportation by public carrier of children attending public and Catholic parochial schools. The latter gave, in addition to secular education, religious instruction in the Catholic faith.)

Mr. Justice Black, speaking for the majority, stated that "[w]hether this New Jersey law is one respecting

an 'establishment of religion' requires an understanding of the meaning of that language. . . ." 330 U.S. at 8. Mr. Justice Black then extensively reviewed the background and environment of the period during which the "establishment" clause was fashioned.

> A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches . . . . Among the offenses for which . . . punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them. These practices of the old world were transplanted and began to thrive in the soil of the new America . . . . These practices became so commonplace as to shock the freedom loving colonials into a feeling of abhorrence . . . . It was these feelings which found expression in the First Amendnent . . . . The people . . . reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group. 330 U.S. at 8-11.

Pointing out that the Supreme Court had given broad meaning to the "free exercise" clause, Mr. Justice Black stated that "[t]here is every reason to give the same application and broad interpretation to the 'establish-

ment of religion clause.' " 330 U.S. at 15. He then concluded with the following sweeping language:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 330 U.S. at 15-16.

The opinion also discussed the state's provision of general government services such as ordinary police and fire protection to parochial schools. Such "serve much the same purpose and accomplish much the same result" as the transportation statute at issue here. 330 U.S. 17. Withdrawal of such services would make it more difficult for the schools to operate.

> But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a *neutral in its relations with groups of religious believers and non-believers;* it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them . . . . The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools. 330 U.S. at 18. [Emphasis added.)

The opinion ends,

> The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. 330 U.S. at 18.

In *McCollum v. Board of Educ.*, 333 U.S. 203 (1948) this Court approved *Everson* and explicitly rejected Illinois' arguments that government neutrality was to be between religious and non-religious beliefs:

> . . . Recognizing that the Illinois program is barred by the First and Fourteenth Amendments if we adhere to the views expressed both by the majority and by the minority in the *Everson* case, counsel for the respondents challenge these views as dicta and urge that we reconsider and repudiate them. They argue that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religious. . . . [W]e are unable to accept . . . [this contention]. 333 U.S. at 211.

To the same effect on this point is *Torcaso v. Watkins*, 367 U.S. 488 (1961):

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers . . . 367 U.S. at 495.

The *Torcaso* opinion also expressly approved of the broad *Everson* "establishment" clause language. 367 U.S. at 492-93.

In *Engel v. Vitale*, 370 U.S. 42 (1962) the practice of prayer reading in school was held to be "wholly inconsistent" with the "establishment" clause. 370 U.S. at 421. The defect involved in the *Engel* case was that the state itself promulgated religious doctrines in the schools.

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially-approved religion is plain. But the purposes of the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. . . . . Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious prosecutions go hand in hand. 370 U.S. 431-32.

School District of Abington Twp. v. Schempp, 374 U.S. 203 (1963) provides the concrete test by which the Military Selective Service Act's discrimination between religious and non-religious objectors must fall. In the *Schempp* case (involving voluntary attendance at Bible reading in schools), this Court expressly reaffirmed the neutrality doctrine of *Everson*, 374 U.S. at 216, 218, reviewed earlier Supreme Court cases which had considered the "establishment" clause, and then proceeded to fashion the following test:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment: If either is the advancement of religion then the

> enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of non-religious belief, to the "establishment" clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. 374 U.S. at 222.

It is obvious that Section 6(j) of the Act favors "all believers over all non-believers" who are opposed to war, and that the conscientious objector provision is primarily *not* secular in purpose or primary effect. The purpose of section 6(j) is to permit registrants who profess certain religious beliefs to fulfill their military obligations in a manner which is consistent with their beliefs. By doing so, the primary effect of this Governmental action is to sanction and respect certain beliefs over others, merely because the former are religious and not secular.

There is, *in ultimo,* only one basis of distinction between religious believers and religious non-believers. But for the Government to condition receipt of either a right or privilege upon that distinction (religiousness, *vel non*) clearly crosses the wall the "establishment" clause of the Constitution has erected.

D. It Is Unconstitutional to Deny a Selective, Non-Religious Conscientious Objector an Exemption by Analogy to the Preceding Arguments.

If this Court accepts the argument that it is unconstitutional to discriminate between selective and non-selective religious objectors, and unconstitutional to allow the grant of the exemption only to religious and

not non-religious objectors, the Court must now decide the issue at bar in the present case: Is Section 6(j), by denying exemption to a non-religious, selective objector, unconstitutional? *Amicus* argues that if the former two arguments are viable, the inevitable conclusion must be in the affirmative.

The "establishment" clause position set forth in part C of Argument compels this Court to allow the grant of exemption to any conscientious objector regardless of whether his belief is religious or not as long as the belief is sincerely held. A modified, secularized *Seeger* test might be applied here to require the non-religious belief to "occupy the same place in the life of the objector as a religious belief."

The "equal protection," "due process" and "establishment" clause positions set forth in part B of Argument require the grant of exemption to any religious objector whose belief requires him to refuse to participate in the particular war for which he might be drafted, although he may, under some hypothetical circumstances, not be opposed to *all* wars. Again, the exemption to a religious selective objector must extend to his non-religious counterpart to avoid "establishing" religious belief. Thus, if Section 6(j) precludes the grant of an exemption to a selective, non-religious objector such as Sisson it is constitutionally infirm.

A test, such as that in *Bowen*, might be required to determine if the selective religious objector's belief is reasonable in light of the totality of his belief. Extending the modified *Seeger* test, *supra*, the same test may also be applied to non-religious selective objectors, utilizing the *Bowen* rationale which seems to view the selectivity issue as an integral element of an objector's beliefs and relying on sincerity and reasonableness alone.

Ballard v. United States, 322 U.S. 78 (1944) may be read to preclude even the reasonableness test in *Bowen*. "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." 322 U.S. at 86. However, at least one commentator has argued, that *Ballard* has been modified in its effect: "*Seeger* appears to modify the effect of [*Ballard*] at least where Section [6(j)] is concerned. To *Ballard's* holding that the truth or falsity of religious views is not a matter into which a Court can inquire, *Seeger* adds the gloss that in the context of conscientious objection there may be some views which, however true they may be and no matter how sincerely held, cannot compel recognition as 'religious.'" McGill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 Va. L. Rev. 1355, 1368-69 n. 57 (1968). It should be added that this need have no effect here if the "establishment" clause argument devitalizes the "religious" test which *Seeger* may otherwise require, and that *Seeger* still serves the useful and important purpose of determining whether the belief is sincerely and reasonably held and whether it is of such nature as to be respected by grant of exemption.

Conclusion.

Amicus respectfully prays that in its decision in the present case, this Court should reach the issue of whether a non-religious selective objector may be constitutionally denied an exemption granted to his religious believing counterpart. *Amicus* urges this Court to affirm the arrest of judgment of respondent Sisson and declare those portions of Section 6(j) of the military Selective Service Act of 1967 which refer to "religious training and belief" unconstitutional, and to over-

rule the judicial interpretations of the phrase "participation in war in any form" which preclude selective objection.

Furthermore, it should be noted that while the ruling prayed for by *Amicus* may increase considerably the number of registrants entitled to conscientious objector's status (a classification of I-O under 32 C.F.R. §1622.14 (1969)) it will not relieve them from duty in alternate civilian service in the national interest as provided by 32 C.F.R. pt. 1660 (1969) which has been historically required of all conscientious objectors. Each conscientious objector will be required to perform at least two years of alternate civilian service which serves the national interest, and must be called in the same order of call and subject to the same rules of priority and qualification as any other inductee holding the availability classification of either I-A (32 C.F.R. 1622.10 (1969) or I-A-O (32 C.F.R. 1622.11 (1969)). *See Local Board Memorandum No. 64* (reprinted at 1 S.S.L.R. 2183 (1969)).

Respectfully submitted,*

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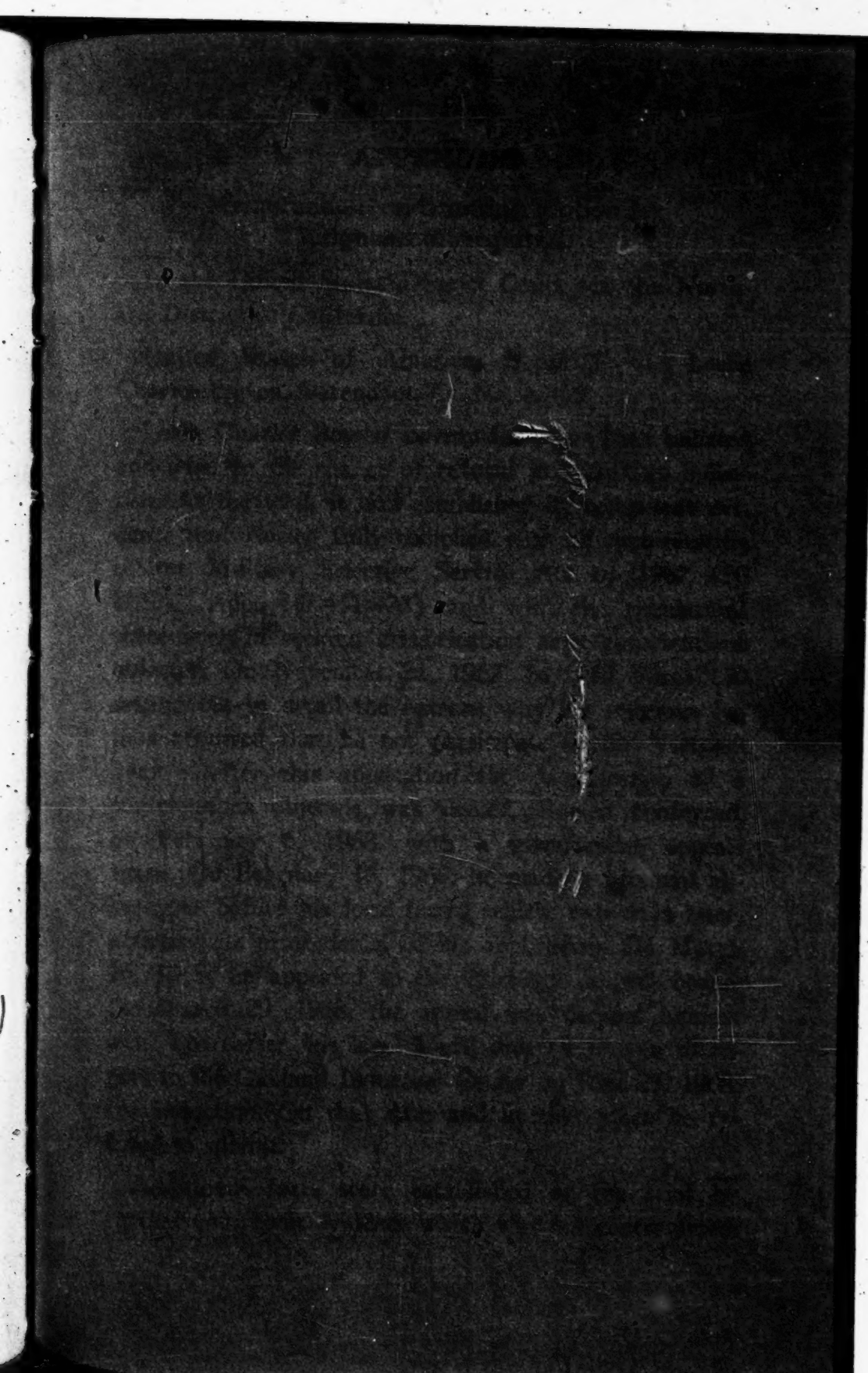
*Counsel gratefully acknowledge the legal research and drafting assistance of Scott J. Tepper, a law student at Harvard University, and a member of the Committee for Legal Research on the Draft of the Harvard Law School.



APPENDIX.

Memorandum on Granting Motion for Judgment of Acquittal.

In the United States District Court for the Northern District of California.

United States of America, Plaintiff, vs. Leslie Charles Bowen, Defendant. Cr. No. 42499.

Leslie Charles Bowen, twenty-four, has been indicted and tried on the charge of refusal to submit to induction. At the trial, it was established by competent evidence that Bowen fully complied with all requirements of the Military Selective Service Act of 1967 (50 U.S.C. App. §§ 451-473) and with the regulations thereunder in seeking classification as a conscientious objector. On November 21, 1967, he filed Form 150 setting out in detail the reasons why his religious beliefs required that he not participate in the Vietnam War. After this application for classification as a conscientious objector was denied, Bowen conferred, on February 6, 1968, with a government appeals agent. On February 16, 1968, he made a personal appearance before his local board which, two days later, affirmed its prior denial of his application. On March 16, 1968, he appealed to the Michigan appeal board. On March 29, 1968, the appeal was decided against him. Thereafter, his local board ordered Bowen to report to the Oakland Induction Center on June 23, 1968, for induction. On that date and at that place he refused to submit.

Additional facts were established at the trial by further competent evidence which was not contradicted.

Defendant Bowen is by training and belief a Roman Catholic. He was baptized a Catholic as an infant. He attended Catholic parochial schools for most of his formal education. He has remained a practicing Catholic throughout his life.

According to Catholic doctrine, as Bowen understands it, there are just and unjust wars.[1] This Catholic doctrine, to which Bowen sincerely deems himself

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[1]It is not for the courts to explore into what is or is not doctrinal orthodoxy. A salutary incident of the separation of church and state is the corollary that Congress and the courts do not involve themselves in theolotical disputes—a task for which they are ill-suited. In questions of conscientious objection, the courts' role, as defined by the Supreme Court, "is to decide whether the beliefs professed by a registrant are sincerely held, and whether they are in his own scheme of things, religious." United States v. Seeger, 380 U.S. 163, 184-5 (1965). Without presuming, then, to make a conclusive statement about what is orthodox Catholic doctrine, this Court concludes from the ample testimonial and doctrinal evidence introduced at trial that at least a substantial number of knowledgeable Catholic leaders count the doctrine of just wars as a basic element of church dogma, that Bowen reasonably believed Catholic doctrine to require that he make his own determination as to whether the war was or was not just and, that having decided it was unjust, conscientiously believed his religious faith made it imperative that he refuse to serve. This conclusion is based on: (1) the uncontroverted testimony of defendant, at Aquinas College, and of the Reverend James E. Straukamp, an ordained Catholic priest; (2) stipulations of counsel as to the testimony of witnesses; (3) documents produced by the Reverend Peter J. Riga, Professor of Theology at St. Mary's College, the Reverend William J. O'Donnell, Assistant Pastor, St. Joachim's Church, Hayward, California and the Reverend Terence O'Shaughnessy, O.P., Chairman, Theology Department, Aquinas College; and (4) the introduction into evidence of excerpts from the Second Vatican Council's *Pastoral Constitution in the Modern World* (especially note 79), of a collective pastoral letter of the American Hierarchy, *Human Life in Our Day*, November 15, 1968 and of the Encyclical of Pope John XXIII, *Pacem in Terris*.

While not of direct pertinence, it is to be noted that *amicus curiae* briefs were brought to the Court's attention which documented the view that communicants of other faiths—Protestant and Jewish—have ample doctrine in their religions to support similar religious conscientious objection.

bound by his religion, sets out certain standards according to which each Catholic is to determine for himself whether a war is just. If he determines it is unjust, a Catholic must not participate in it. To do so would be to violate his religion. After instruction and study in this doctrine, Bowen concluded that it would violate his religion and his conscience to participate in the Vietnam War.

There is no question about the defendant's religious motivation nor his sincerity in refusing, as a matter of religious belief, to submit to induction. Both were fully established at the trial.

The only questions are whether, under Section 6(j) of the Military Selective Service Act of 1967, Bowen should have been granted conscientious objector status and, if not, whether the Section is constitutional.

Section 6(j) provides that exemption from "combatant training and service in the Armed Forces" shall be granted to any person "who by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Defendant, urging that he should have been granted conscientious objector status, contends that since the statutory language is not explicit in requiring objection to all wars, constitutional doubt should be avoided by construing the Section to include objectors to particular wars. The argument is that the language should be given a practical interpretation; that the only meaningful question for each registrant is whether his religious beliefs allow him to participate in the war to which he will have to contribute if inducted; and that to inquire into a person's possible stance on any hypo-

thetical future war is to indulge in speculation on a question of critical importance to the individual.

The argument has some persuasive strength but this Court is foreclosed by precedent from such a construction of the statute. The interpretation that Section 6(j) requires opposition to all wars appears to be too well-established to be open to challenge here. *Kauten v. United States*, 133 F.2d 703, 708 (2d Cir. 1943); *Negre v. Larsen*, Cr. No. 24067 (9th Cir. November 10, 1969).[2]

The Military Selective Service Act of 1967, then, distinguishes between persons who object to all wars on the basis of religious training and belief and those who object on that basis to some one or more wars, but not all. The constitutional validity of this distinction is therefore brought into question in this case. It is brought into question in two respects. First, does the distinction violate the command of the First Amendment against "any law respecting an establishment of religion"? Second, does that distinction amount to such serious and unjustifiable discrimination as to make it a violation of the due process clause of the Fifth Amendment? *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

The United States argues that no substantial constitutional issues are raised by this case.

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[2]Negre v. Larsen involved an in-service objector to the Vietnam War. In a per curiam decision, the Ninth Circuit ruled that Negre should not be discharged from the service because (1) he did not object to "war in any form" and (2) because his views were not based on religious training and belief. In the present case, the fact that Bowen's views are based on religious training and belief forces the Court to consider the constitutional questions.

Quoting from *Cannon v. United States*, 181 F.2d 354 (9th Cir. 1950), the Government makes the argument that since all persons may be called to service, exemption is a matter of grace and not subject to any constitutional limitations. However, since *Cannon*, the Supreme Court has held that, although Congress may take certain privileges or benefits away altogether, it may not arbitrarily and unreasonably grant such privileges to some and not to others. *Sherbert v. Verner*, 374 U.S. 398 (1963). *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 *Harv. L. Rev.* 1439 (1968). Thus, in this case, any exemption granted by Congress is subject to the limits of the Constitution.[4]

The Government argues further, that because the statute makes no mention of specific religious sects and because it inquires into the subjective beliefs of the individual applicant rather than into the tenets of one's religion, there is no discrimination between religions. Here, again, the Government's contentions are devoid of merit. The constitutionality of a statute is measured more by the results of its application than by its phraseology.[5] Responsible court inquiry must go beyond the

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[4]"We find it unnecessary to determine whether an exemption for some or all conscientious objectors is a constitutional necessity, or is merely dependent upon the will of Congress. . . . For it now seems well-established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions. *See* Speiser v. Randall, 357 U.S. 513 (1958). It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination." United States v. Seeger, 326 F.2d 846, 851 (1964). *See also* Sherbert v. Verner, 374 U.S. 398 (1963).

[5]If the statute in terms provided that Quakers should be exempt but Catholics should not, there could be no reasonable doubt of its

(This footnote is continued on the next page)

words to the practical effects. *Terry v. Adams,* 345 U.S. 461 (1953). Constitutional infirmities may not be covered up or overcome by apparently innocuous statutory language. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886) (statute applying to wooden laundries found to discriminate against Chinese citizens); *Epperson v. Arkansas,* 393 U.S. 97 (1968) (law prohibiting the teaching in public schools of the doctrine of evolution found to discriminate in favor of fundamentalist Protestant religions, even though no mention made of any religion.) Nor it is permissible to discriminate invidiously by employing as statutory standards individual traits which effectively distinguish one group from another. *Guinn v. United States,* 238 U.S. 347 (1915) (grandfather clauses); *Hobson v. Hansen,* 269 F. Supp. 401 (D.D.C. 1967) (de facto school segregation; tracking system has adverse effect on disadvantaged minorities).

An examination of the practical effects of Section 6(j), based on judicial notice, the *amicus* briefs, and the extensive testimony in this case, leads necessarily to the condlusion that members of traditionally pacifist religions—such as Quakers and Jehovah's Witnesses—are generally exempted from military service while members of other religions—such as Bowen's Roman Catholic faith—are not so exempted.

The First Amendment to the Constitution states: "Congress shall make no law respecting an establish-

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constitutional invalidity. The infirmity is no less if that is the effect of the statute even if the phraseology is not that bald.

ment of religion . . ." The Supreme Court has recently declared the meaning of this central principle of separation of church and state as follows:

> Government in our democracy, state and national, must be *neutral in matters of religious theory,* doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and *it may not aid, foster, or promote one religion or religious theory against another* or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion and between religion and nonreligion. *Epperson v Arkansas,* 393 U.S. 97, 103-4 (1968) (emphasis added).

In denying conscientious objector status to Bowen based upon his religious opposition to the Vietnam War but permitting it to one whose religious opposition is to all wars, the effect of Section 6(j) is to breach the neutrality between religion and religion required by the mandate of the First Amendment.

Section 6(j) must also fall before the constitutional prohibition against denial of equal protection of the laws. As has been seen, the Section permits exemption to religious "absolute" objectors but denies it to religious "selective" objectors. In this, it denies equal protection and, therefore, due process under the doctrine of *Bolling v. Sharpe, supra.*

This violation of the Fifth Amendment is, of course, bottomed on substantially the same defects in Section 6(j) as those which make it violative of the First Amendment. Because the First Amendment specifically applies to religion whereas the equal protection clause has a much broader sweep, discrimination between dif-

ferent religious doctrines has generally been considered in connection with the establishment clause of the First Amendment. However, a recent Supreme Court decision, based on equal protection, seems particularly applicable here. Normally, courts require only that a statute employ a classification which is reasonable in the light of the purposes of the Act. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), this test was held not to be controlling. There the Court held unconstitutional a requirement that to be eligible for welfare, persons must have lived within the jurisdiction for one year. The Court noted that the residency requirement discouraged travel and concluded that where so fundamental a right as the right to travel is infringed, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." 394 U.S. at 634 (emphasis in original). *See also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (the Court indicated that it would examine with "strict scrutiny" legislation which infringed on a right as important as that of procreation). In other cases it may be difficult to determine whether the right involved should be considered fundamental, but no rights are more fundamental than those of the First Amendment here involved. So, applying the *Shapiro v. Thompson* test, it is clear that there is no compelling governmental interest for distinguishing the defendant, who is opposed to participation in the Vietnam War on religious grounds, from others who are religiously opposed to all wars.[6]

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[6]It is recognized that Section 6(j) may serve administrative efficiency by limiting the class of persons eligible for conscientious objector status. However, it is doubtful that the sincerity

Having concluded that the classification established by Section 6(j) is unconstitutional, it is unnecessary to reach the much broader argument that the Section also violates the First Amendment's command against any law prohibiting the free exercise of religion.

The motion for judgment of acquittal is granted.

Dated: December 24, 1969.

/s/ STANLEY R. WEIGEL
Judge

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of religious objectors to all wars can be more reliably determined than the sincerity of religious objectors like Bowen. In any case, administrative convenience is not a sufficiently compelling consideration to justify disregard of the First and Fifth Amendments.